

Presently before the Court is the movant's "Motion for an Independent Action in Equity" (Docket Entry No.22), brought pursuant to Rule 60(d), Fed. R. Civ. P. In the Motion, the movant claims that, but for counsel's ineffectiveness, "his sentence would be less." Docket Entry No.22 at pg.2.

When a Rule 60 motion attacks "the substance of the federal court's previous resolution of a claim on the merits", the Rule 60 motion is, in essence, a second or successive application for habeas corpus relief. Gonzalez v. Crosby, 545 U.S. 524, 532 (2005)¹; Johnson v. Bell, 605 F.3d 333, 341 (6th Cir.2010). In this instance, the movant has already unsuccessfully challenged the effectiveness of counsel in a motion brought pursuant to 28 U.S.C. § 2255. His Rule 60(d) motion, therefore, is a second attempt to bring into question the legality of movant's conviction and sentence. As a consequence, the Court is inclined to construe the movant's Rule 60(d) motion as a second motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence.

Before a second or successive petition for habeas corpus relief may be adjudicated in the district court, the movant must file a motion in the appropriate court of appeals for an order authorizing the district court to consider the petition. 28 U.S.C. § 2255(h). Clearly, the movant has not yet sought and obtained the authorization from the Sixth Circuit Court of Appeals needed for this Court to consider his current Motion. Therefore, transfer of this action to the Sixth Circuit Court of Appeals for further consideration would be appropriate. 28 U.S.C. § 1631; In re: Sims, 111 F.3d 45, 47 (6th Cir.1997).

The movant, however, has had no prior notice that the Court would construe his Motion as

¹ The Gonzalez decision considered only the extent to which Rule 60(b) applied to habeas corpus proceedings brought pursuant to 28 U.S.C. § 2254 and its holding was explicitly limited to § 2254 cases. Gonzalez, *supra* at 545 U.S. 529, fn.3. Nevertheless, this decision is instructive as to when a post-conviction motion should be deemed a second or successive request for habeas corpus relief.

something other than a Rule 60(d) motion. Moreover, he has had no opportunity to respond to the possibility that his Motion would be transferred to another court for review. Accordingly, the movant is hereby GRANTED fourteen (14) days from the date of entry of this order on the docket in which to SHOW CAUSE why the “Motion for an Independent Action in Equity” should not be construed as a second or successive petition under 28 U.S.C. § 2255 and be transferred to the Sixth Circuit Court of Appeals for further consideration. Castro v. United States, 540 U.S. 375,383 (2003).

It is so ORDERED.

A handwritten signature in black ink that reads "Todd Campbell". The signature is written in a cursive style with a horizontal line underneath the name.

Todd Campbell
United States District Judge